

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) 1:11-cr-00091-JAW-1
)
RICHARD GRAF,)
)
 Defendant)

**PRELIMINARY ORDER RE: DEFENDANT’S
SECOND MOTION TO SUPPRESS**

Defendant filed his first motion to suppress, requesting a Franks hearing, in August 2011. (ECF No. 25.) The Court denied the motion and denied a hearing based on a recommended decision finding that Defendant did not make a substantial preliminary showing that the search warrant affiant knowingly or recklessly made false statements in support of his search warrant application. (Order Adopting Rec. Dec., ECF No. 39; Rec. Dec., ECF No. 34.) On September 27, 2012, the presiding judge granted Graf leave to file a second motion to suppress. (Text Order, ECF No. 89.) Now pending is Defendant’s second motion requesting a Franks hearing. (ECF No. 92.) The Court referred the motion to me for report and recommended decision.

Defendant argues that he should have a hearing because he has investigated search warrant records maintained by the Maine District Court and has uncovered new information suggesting that the affiant was untruthful or misleading about the identity of his confidential informant. The supplemental affidavit supplied by the original search warrant affiant in support of the Government’s response raises as many questions as it resolves. Thus, although Defendant has not yet made a substantial preliminary showing that the affiant knowingly or recklessly supplied the state justice of the peace with false or misleading information, Defendant has raised

a serious concern calling for the present Order in order to enable me to determine whether such a showing might be plausible if a Franks hearing were convened.

BACKGROUND

Since his initial motion to suppress, Defendant has pursued at least two lines of investigation related to Lt. Gottardi's warrant affidavit. First, Defendant retained a private investigator to attempt to uncover the identity of confidential informant 11-25. Second, defense counsel sent a member of his staff to review warrant applications filed in the last two years by Somerset County deputies to see if there have been other applications relying on "CI 11-25," as represented in Gottardi's April 2011 application to search Defendant's premises. (Pelkey Aff. ¶ 4, ECF No. 92-2.) It is the second line of investigation that warrants discussion. What Defendant discovered is that there were no prior warrant applications disclosing CI 11-25 as a confidential informant, but that there were two such applications filed after the April 2011 application. (Id. ¶¶ 5-7.) The particulars related to 11-25 follow, but the short version is that the Somerset County Sheriff's Office either has multiple confidential informants whom it identified as 11-25 over the relatively short span of several months (to the same justice of the peace) or no such informant.

The warrant application

Detective Lieutenant Carl E. Gottardi of the Somerset County Sheriff's Office obtained a warrant to search Defendant's premises in April 2011. In support of the warrant application, Gottardi submitted an affidavit that relied entirely on information supplied by one confidential informant to make the probable cause showing. (Aff. & Request for Search Warrant, ECF No. 25-2.) Gottardi described the informant ("11-25") as "a very reliable informant for your affiant, for the past several years." (Id. at 2.) According to Gottardi: "with information provided by 11-

25 . . . your affiant has obtained numerous search warrants, in which large amounts of drugs, marijuana plants and drug related paraphernalia [have] been seized, with numerous persons being charged and convicted of various felony/misdemeanor drug offenses.” (Id.) Gottardi further asserted “that 11-25 has also provided other law enforcement officials reliable drug related information in the past.” (Id.) From there, Gottardi described in general terms 11-25’s prior criminal record and history of drug use and explained that 11-25 had assisted Gottardi both in exchange for consideration related to pending charges and at other times without requesting any type of consideration. (Id.)

With this informant profile established, Gottardi related 11-25’s information about Defendant. In sum and substance, 11-25 knew Defendant personally, described his camp-style residence and its location, reported knowing that Defendant had for several years “continually sold large amounts of marijuana,” and reported being at Defendant’s residence with associates “on numerous occasions over the years” for the purpose of purchasing marijuana (id.), including in pound amounts (id. at 3). Furthermore, 11-25 related that in the month of April 2011 he was present when an associate picked up a large amount of marijuana from Defendant at his residence. (Id.)

Multiple Confidential Informants Identified as 11-25

Samantha Pelkey is a legal assistant at the law firm of Vafiades, Brontas & Kominsky, LLP. (Pelkey Aff. ¶ 1, ECF No. 92-2.) In May 2012, defense counsel Terence Harrigan asked Pelkey to go to the Somerset County Courthouse and review all search and arrest warrant applications filed in the past two years to see if additional references could be found to informant 11-25. (Id. ¶ 2.) According to Pelkey, there are only two other warrant applications that use informant 11-25 and both were filed after Gottardi’s application for a warrant to search

Defendant's premises. (Id. ¶¶ 6, 7.) Defendant has attached the two warrant applications to his motion, one filed in July 2011 and another filed in October 2011. (Id. ¶ 6; Pelkey Aff. Ex. A, ECF No. 92-2; Pelkey Aff. Ex. B, ECF No. 92-3, 92-4.) The documents reflect that the same justice of the peace considered both applications and also the application submitted by Gottardi concerning Defendant's premises.

In the April 2011 warrant affidavit associated with Defendant's residence, 11-25 is described as follows:

Your affiant would note that 11-25 has been a very reliable informant for your affiant, for the past several years. Your affiant would note that with information provided by 11-25, which he/she had personal knowledge of, and/or had received from associates of his/hers, your affiant has obtained numerous drug search warrants, in which large amounts of drugs, marijuana plants and drug related paraphernalia has been seized, with numerous persons being charged and convicted of various felony/misdemeanor drug offenses. Your affiant would also note that 11-25 has also provided other law enforcement officials with reliable drug related information in the past.

Your affiant would note that 11-25 does have a criminal record, to include convictions for drug related offenses. Your affiant would note that 11-25 is a known drug user, who associates with numerous, convicted drug dealers, known to your affiant.

Your affiant would note that over the past several years, 11-25 has routinely assisted your affiant in apprehending drug dealers, without requesting any type of consideration from your affiant. Your affiant would note that 11-25 has also assisted your affiant in the past, to hopefully gain consideration on pending criminal charges against him/her. Your affiant would finally note that when 11-25 provided your affiant with the information contained herein, 11-25 had no criminal charges pending against him/her, nor did he/she request any type of consideration from your affiant for providing said information.

(ECF No. 92-7 at 2, ¶ 1.)

In a July 2011 warrant affidavit associated with one Eugene Hutchins's residence, 11-25 is described by Gottardi as follows:

Your affiant would note that 11-25 has been a very reliable informant for your affiant, over the past several years. Your affiant would note that with assistance/information provided by 11-25, your affiant has solved numerous

felony level crimes, to include Robbery, burglaries and drug cases. Your affiant would note that 11-25 has made controlled drug purchases for the police. Your affiant would note that information provided by 11-25, which he/she had personal knowledge of, and/or that he/she has acquired from associates of his/hers, has proven to be very reliable and accurate.

Your affiant would note that 11-25 has routinely assisted your affiant over the past several years, without requesting any type of consideration from your affiant. Your affiant would also note that 11-25 has also assisted your affiant at times, when he/she did have criminal charges pending against him/her.

Your affiant would note that 11-25 does have a criminal record, which does include felony level convictions. Your affiant would note that 11-25 is a past known drug dealer/drug user, and 11-25 does routinely associate with numerous known drug dealers/drug users. Your affiant would note that when 11-25 provided your affiant with the information contained herein, he/she did not have any criminal charges pending against him/her, nor did he/she request any type of consideration from your affiant.

(ECF No. 92-2 at 6.)

In an October 2011 warrant affidavit associated with one Paul Vigue's residence, 11-25 is described by Staff Sergeant Michael W. Knight as someone who gave information to Lt. Gottardi. Sgt. Knight says that Lt. Gottardi told him the following about 11-25:

Your affiant was advised by Lt. Gottardi that 11-25 has in the past supplied him with reliable drug related information on persons known to him/her. Lt. Gottardi advised your affiant that 11-25 is a known drug user and a person that associates with other drug users/drug dealers. Lt. Gottardi advised your affiant that information provided by 11-25, on some of the drug dealers known to him/her, has been corroborated by other independent reliable sources.

Your affiant was advised by Lt. Gottardi that 11-25 is presently assisting him with apprehending drug dealers known to him/her, as 11-25, is in hopes that the District Attorney will take his/her cooperation into consideration, regarding felony level criminal charges that are presently pending against him/her.

Your affiant would note that 11 -25, in 2011, has made controlled drug purchases from drug dealers known to him/her, for the Somerset County Sheriff's Department.

(ECF No. 92-3 at 6, ¶ 1.)

Lt. Gottardi's responsive affidavit

Lt. Gottardi has provided a supplemental affidavit stating that he periodically changes the identifying numbers assigned to confidential informants. According to Gottardi, 11-25 has previously been assigned four different identifying numbers and was not 11-25 in prior years. (Gottardi Aff. ¶ 2, ECF No. 95-1.) Gottardi does not disclose the existence of any system for assigning number identifiers to confidential informants. Nor does he explain why he uses number identifiers instead of simply a generic identifier such as "CI."

Gottardi further states that "occasionally" his identifying numbers are reused for different persons. Thus, he attests:

For example, the CI 11-25 referenced in the Eugene Hutchins and Paul Vigue search warrants are not the same person. They are two different informants and neither of them [is] the same person designated CI 11-25 in the Graf search warrant. This is apparent from comparing the pedigree and background information for CI 11-25 in the Hutchins, Vigue, and Graf search warrants.

(Id. ¶ 5.) Gottardi explains that he changes the identifying numbers to "ensure . . . continued anonymity and safety" for his informants. (Id. ¶ 6.) However, Gottardi does not explain why he would give more than one informant the same identifying number within a relatively short period of time nor does he offer any plausible reason why re-use of the same number would protect the safety of an informant.

DISCUSSION

The primary thrust of Defendant's new motion to suppress is that Lt. Gottardi's affidavit reflects a "reckless disregard for the truth." (Mot. at 1, ECF No. 92.) According to Defendant, Gottardi must have lied when he stated that he has obtained numerous search warrants with the information supplied by 11-25, because there are no prior warrant applications disclosing any informant identified as 11-25. (Id. at 2.) Defendant also observes that the descriptions given of

11-25 in the July and October applications make no mention of any prior search warrants, suggesting that the application for a warrant to search Defendant's premises contained a known material falsehood or else erroneous boilerplate that should have been omitted (assuming that 11-25 is the same person in all three warrant applications). (Id.) Defendant's position is that Gottardi "has displayed a reckless disregard for the truth by exaggerating CI 11-25's reliability and use in the past." (Id. at 3.)

After reviewing Lt. Gottardi's supplemental affidavit, Defendant contends that it makes no sense for an officer to assign the same identifier for three different informants in the span of a few months because such a practice would expose informants to misidentification rather than protect them from identification. (Reply Mem. at 1, ECF No. 103.) Defendant further observes that "[b]y assigning the same CI numbers to three different individuals on three different drug cases over a five month period, Gottardi is misleading [local magistrates] who are tasked with reviewing affidavits in support of search warrants," noting further that, "[i]n fact, the same Justice of the Peace reviewed all three affidavits." (Id. at 2.) Defendant fairly comments that this practice could mislead a magistrate who might well assume that 11-25 was a repeat and therefore more reliable informant. (Id.) Defendant also emphasizes that the search warrant application that authorized a search of his residence was entirely based on information supplied by 11-25. (Id. at 3.) Defendant makes additional arguments in support of his motion, but these arguments are addressed to the veracity of the informant rather than the veracity of the affiant.

When a judge, magistrate, or justice of the peace reviews a search warrant application, he or she must assess "whether the totality of the circumstances stated in the affidavit demonstrates probable cause to search the premises." United States v. Barnard, 299 F.3d 90, 92-93 (1st Cir. 2002) (internal quotation marks omitted). The probable cause standard requires that the totality

of the circumstances described in the supporting affidavits demonstrate “a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). “Where . . . the basis for the magistrate’s probable cause finding was information provided by an unnamed informant, the affidavit must provide some information from which the magistrate can assess the informant’s credibility.” United States v. Greenburg, 410 F.3d 63, 67 (1st Cir. 2005).

In this case, the warrant in question supplies probable cause to search Defendant’s premises, provided that the informant truly exists and said what the affiant represented to the Justice of the Peace. “When the government obtains a search warrant based on information provided by a confidential informant, defendants often lack the information required to meet the exacting standards of Franks.” United States v. Higgins, 995 F.3d 1, 3 (1st Cir. 1993). Nevertheless, in some cases courts will conduct in camera examinations of the affiant, and sometimes also of the informant, to determine the substantiality of the defendant’s initial showing in support of a motion for a Franks hearing. Id. The exact nature of the hearing is a matter within the trial court’s discretion. United States v. Higgins, 995 F.2d 1, 3 (1st Cir. 1993) (citing United States v. Giacalone, 853 F.2d 470, 477-78 n.1 (6th Cir. 1988)).

Defendant has exposed an irregular practice of identifying confidential informants that raises some cause for concern about Lt. Gottardi’s underlying affidavit. If 11-25 is not an actual person—taking the most negative possible inference one could draw from these strange circumstances—then there would be no probable cause whatsoever to support the search of Defendant’s residence and there would be a problem more significant than a mere dispute over the veracity of the informant.

At present, I am not persuaded that Defendant has made a *substantial* preliminary showing that Lt. Gottardi supplied the Justice of the Peace with false representations concerning the background of 11-25 as described in his May 2011 warrant application. The mere fact that there is no earlier warrant application involving an informant identified as 11-25 readily can be explained by a practice of changing an informant's numerical identifier over time. Based on his supplemental affidavit, that is exactly what Lt. Gottardi would say he did, if called to testify at a Franks hearing.

The issue of greater concern is that, according to Lt. Gottardi, there has been a practice of assigning the same numerical identifier to three different confidential informants within a relatively brief timespan. I agree with Defendant that this is a surprising revelation about what seems to me a highly irregular, ill-advised, and potentially misleading procedure. That an experienced detective would identify three different informants as "11-25" in a brief period of time certainly invites a measure of incredulity.¹ But I am not persuaded that an immediate Franks hearing is going to resolve the matter in a satisfying way if the Court simply has Lt. Gottardi as a witness. Nor do I conclude that it would be the most effective way to proceed at this juncture if I ordered the Government to produce one or more 11-25s for an in camera hearing or interview. Given the peculiar nature of the circumstances, this Preliminary Order charts an intermediate course.

¹ The irony here is that this predicament likely would not have arisen if Lt. Gottardi simply identified his confidential informant as "confidential informant" or "CI." It is precisely his use of the 11-25 identifier, apparently for the first time in the underlying warrant application, but also for two different individuals in other applications submitted shortly thereafter, that raises cause for concern. The Government argues that "Lt. Gottardi's explanation of his practice . . . puts into context the results of Ms. Pelkey's research" and that Defendant's inability to identify the individual in question is proof that Lt. Gottardi's system of identification works. (Govt' Response at 5-6, ECF No. 93.) I am not persuaded that this presentation is quite so simple or insignificant.

CONCLUSION

The Government is hereby ordered to investigate this matter to assure itself (1) that the 11-25 described in the April 2011 warrant application is an ascertainable individual with the history and “pedigree” Lt. Gottardi has attributed to him; (2) that there were prior matters in which this same 11-25 (under whatever other identifier) supplied information supporting drug search warrants; and (3) that there were in fact three separate informants identified as 11-25 between April and October of 2011. The Government will file an in camera report by November 29, 2012, pertaining to the foregoing investigation, including the nature of the investigation conducted, who conducted it, the means used to verify the existence of the informants it was able to identify, and the basis for identification. The investigating individual will be someone other than the prosecuting attorney assigned to this specific case and will not be employed by the Somerset County Sheriff’s Department or the Bureau of Alcohol, Tobacco or Firearms. He or she will submit an affidavit in support of the Government’s report after reviewing Lt. Gottardi’s files and reports and other information, including other search warrants issued on the basis of information provided by the CI 11-25 identified in the April 11, 2011, search warrant application.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Federal Rule of Criminal Procedure 59.

So Ordered.
November 7, 2012

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

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